should be dismissed and that the appellants should pay the costs of the appeal.

*Appeal dismissed.*

Solicitors: *Graham Page & Co.; Bukring & Davis.*

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## KUNG SIANG NG v. PUBLIC PROSECUTOR

**[A.Cr.J. (Lee Hun Hoe J.C.) January 13, 1965]**

**[Sibu — Criminal Appeal No. CA /15/64]**

*Shipping — Collisions at sea — Interpretation Ordinance, (Cap. 1), s. 42 — Merchant Shipping Ordinance, 1960, s. 249 — International Regulations for Preventing Collisions at Sea, 1948 — Misdemeanour — Jurisdiction — Triable in district court — Malaysia Act, 1963, s. 73.*

*Criminal Procedure — Accused not represented — Duty of magistrate.*

The appellant was convicted in the police court of offences under the International Regulations for Preventing Collisions at Sea, punishable under section 42 of the Interpretation Ordinance. He appealed on the ground that the trial was void and illegal.

**Held:** as the offence is a misdemeanour under the provisions of section 419 of the Merchant Shipping Act, 1894, it is only triable under the provisions of section 42 of the Interpretation Ordinance read with section 249 of the Merchant Shipping Ordinance by a district court; therefore the trial was a nullity and the conviction must be set aside.

**Per Curiam:** When an accused person is not represented by advocate magistrates should not overlook the provisions of section 202 of the Criminal Procedure Code (Sarawak Cap. 58). A note should be made if the said section 202 is complied with.

CRIMINAL APPEAL.

*George Seah Kim Seng* for the appellant.

*D. M. Goodbody* (Deputy Public Prosecutor) for the respondent.

**Lee Hun Hoe J.C.:** I allowed the appeal and stated that I would give my reason in writing. This I now do. Appellant was charged before the police court at Kanowit as follows:—

*"1st charge*

That you, on or about the 13th May, 1964 at about 0500 hours, at Batang Rejang, Kanowit, being the jaragan of Sin Kapit No. 2 on controlling the wheel, committed an offence under rule 18 of the 1st Schedule, International Regulations for Preventing Collisions at Sea, 1948, punishable under section 42(2) of the Interpretation Ordinance.

*2nd charge*

That you, on or about the 13th May, 1964 at about 0500 hours at Batang Rejang, Kanowit, being the jaragan of Sin Kapit No. 2 on controlling the wheel committed an offence under rule 22 of the 1st Schedule, International Regulations for Preventing Collisions at Sea, 1948, punishable under section 42(2) of the Interpretation Ordinance.

*3rd charge*

That you, on or about the 13th May, 1964 at about 0500 hours, at Batang Rejang, Kanowit, being the jaragan of Sin Kapit No. 2 on controlling the wheel, committed an offence under rule 25(a) of the 1st Schedule, International Regulations for Preventing Collisions at Sea, 1948, punishable under section 42(2) of the Interpretation Ordinance."

He was acquitted of the 2nd charge but was convicted of the other two charges and fined a total of $90. Being dissatisfied with the decision he appealed. There were four grounds of appeal. The first ground was that the trial was void and illegal. For reasons which will become obvious it is not necessary for me to deal with the other three grounds since I allowed the appeal on the first ground.

Before I deal with the appeal itself I would like to make certain observations. I agree with both Mr. Seah for the appellant and Mr. Goodbody for the respondent that the charges were badly framed. Particulars were not sufficiently given in any of the charges. As a result the appellant probably did not know clearly what case he had to meet. Further these charges are novel and one would have thought that the authorities concerned would take the trouble to seek for legal advice before taking any action. The merchant shipping legislation is ever so complex and fraught with technicalities.

Although in the case docket there is a memorandum from the marine officer, Sibu, to the Superintendent of Constabulary, Sibu, purporting to authorise the latter to prosecute under section 248 of the Merchant Shipping Ordinance there is nothing on the record of the proceedings to indicate that the memorandum had been produced and put in or inspected by the trial magistrate during the trial. At any rate under the said section 248 a person can only be charged on the complaint of the director of marine or any person authorised in writing in that behalf. The said marine officer may be so authorised. But there is nothing in the record to show that he was so authorised. In my view the memorandum is not worth the paper it was written on unless the written authorisation given to the said marine officer was also produced to the court.

When an accused person is not represented by advocate magistrates should not overlook the provisions of section 202 of the Criminal Procedure Code. A note should be made if the said section 202 is complied with. There is nothing in the record to indicate that the provisions of the said section 202 had been complied with.

I now come to the appeal itself. Mr. Seah submitted that the police court had no jurisdiction to hear the case. This submission was conceded by Mr. Goodbody who decided not to argue the remaining grounds when I indicated that I would allow the appeal on the first ground and that I did not think it fair to express my opinion on matters which might prejudice the lower court should there be a fresh prosecution.

Among other provisions saved from repeal

under the Second Schedule of the Merchant Shipping Ordinance are sections 418 and 419 of the Merchant Shipping Act, 1894. I am of the opinion that both sections 418 and 419 are still in force in Sarawak despite the formation of Malaysia in the light of section 73 of the Malaysia Act. The said section 73 reads as follows:—

"73 (1) Subject to the following provisions of this Part of this Act and to any law passed or made on or after Malaysia Day, all present laws shall, on and after Malaysia Day, have effect according to their tenor, and be construed as if this Act had not been passed:

Provided that references to the Federation (except in relation to a time before Malaysia Day) shall be construed as references to Malaysia, and expressions importing such a reference shall be construed accordingly.

(2) Any present law of the Federation passed or made on or after the day this Act is passed shall extend to any part of Malaysia to which it is expressed to extend; but save as aforesaid no present law of the Federation shall extend to any of the Borneo States or to Singapore, unless or until it is so extended by a law passed or made as aforesaid.

(3) Subject to the following provisions of this Part, the present laws of the Borneo States and of Singapore shall, on and after Malaysia Day, be treated as federal laws in so far as they are laws which could not be passed after Malaysia Day by the State Legislature, and otherwise as State laws.

(4) This section shall not validate or give effect to any provision contained in the present law of the Federation which is inconsistent with the Constitution, or any provision of present law which is invalid for reasons other than inconsistency with the Constitution.

(5) In this Part of this Act "present laws" means the laws of the Federation, of each of the Borneo States, and of Singapore passed or made before Malaysia Day, but does not include the Constitution of the Federation or any of those States or this Act."

The International Regulations for Preventing Collisions at Sea 1948 (hereinafter referred to as the collisions regulations) set forth under the First Schedule of an Order in Council (Statutory Instrument 1953 No. 1557) were made applicable to Sarawak by virtue of subsection (2) of section 418 of the said Act. Under subsection (2) of section 419 of the said Act wilful infringement of any provision of the collision regulations is a misdemeanour. It is therefore clear that deliberate failure to comply with any provision of the collisions regulations is made a criminal offence. Breach of the collisions regulations being a misdemeanour the appropriate penalty section would be subsection (1) of section 42 of the Interpretation Ordinance which expressly confers jurisdiction in the district court. Subsections (1) and (2) of the said section 42 are set out below:—

"(1) Where any enactment creates an offence which is expressed to be a misdemeanour and there is no express provision applicable in Sarawak regarding jurisdiction to try the offence or the penalty therefor, a District Court shall have jurisdiction and the penalty shall be imprisonment for seven years and a fine.

(2) Subject as hereinafter provided, a contravention of a written law which has not expressly been declared to be an offence shall constitute an offence: Penalty, in the case of a written law other than subsidiary legislation, imprisonment for six months and a fine of one thousand dollars, and, in the case of subsidiary legislation, a fine of five hundred dollars."

It may be that penalty is provided by some other provision of the said Act which has been saved from repeal of which I am not aware. Even so the position is the same. Since section 249 of the Merchant Shipping Ordinance makes it clear that any offence under the Merchant Shipping Acts whether triable summarily or declared to be a misdemeanour (as it seems to be so in this case) shall be triable by the district court. There cannot be any doubt that the said section 249 confers jurisdiction in the district court. I think I should mention that reference to the Merchant Shipping Acts would include reference to any subsidiary legislation made thereunder. Section 13(f) of the Interpretation Ordinance deals with this in the following words:—

"(f) a reference in a written law to another written law shall include reference to any subsidiary legislation made thereunder; and a reference in a written law to an Act of Parliament or to an Order in Council shall include reference to any enactment made thereunder;"

I note that in the *Sarawak Government Gazette* of 20th November, 1964 under Notification No. 2095 Mr. Michael Sim Kian Hui, who heard the case, was only appointed as magistrate of the first class by his Lordship the Chief Justice on 9th November, 1964. The case was first mentioned on 23rd July, 1964 and concluded on 21st October, 1964 so that at the relevant period he did not have first class magisterial power. Thus it becomes unnecessary for me to express my view on the provision of subsection (3) of section 5 of the Criminal Procedure Code. I believe the trial magistrate was misled by the reference of penalty to subsection (2) of the said section 42 in the charges. As mentioned above under the said subsection penalty in the case of subsidiary legislation is a fine of $500. *Prima facie* the matter would appear to be within the jurisdiction of the police court but for section 249 of the Merchant Shipping Ordinance and subsection (2) of section 419 of the Merchant Shipping Act 1894.

I am satisfied that the charges should have been brought before a district court and that the police court has no jurisdiction to hear the case. Accordingly I hold that the proceedings held at the police court, Kanowit are null and void. The conviction is therefore illegal and must be quashed. Any fine if paid by the appellant must be refunded forthwith. Appeal allowed.

*Appeal allowed.*